

1 A Correct.

2 Q And you would agree that there is nothing  
3 contained in the Network Solutions system that would  
4 indicate there was ever any discussions between Mr.  
5 Gottlieb and Network Solutions about these services  
6 or the nature of these services; correct?

7 A Correct.

8 Q Now, are you aware of whether there is a  
9 reason Network Solutions has elected not to place  
10 the actual text of the terms of service on the  
11 screen for the person to see when they click on the  
12 button to purchase?

13 A I don't know.

14 Q Wouldn't you agree that the customer would  
15 be more likely to read it, if it was there on the  
16 screen?

17 MR. McKAY: Objection. Lack of  
18 foundation.

19 THE COURT: I'll sustain the objection.

20 BY MR. SUROVELL:

21 Q Could you turn to Exhibit 3?

22 A Yes.

23 Q Now, on Exhibit 3, this document indicates

1 that the account holder, which I think is an  
2 organization called Nexus Holdings -- What's the  
3 account holder?

4 A The account holder is the registrant or  
5 the owner of the domain name.

6 Q That's the owner of the account?

7 A Correct.

8 Q Okay. And the primary user is not an  
9 owner; correct?

10 A Correct.

11 Q And just so we're clear, you have no  
12 knowledge about who put this information in the  
13 system; correct?

14 A Correct.

15 Q All you know is that somebody on the  
16 outside from somewhere registered an account for  
17 Nexus Holdings and put the name Brett Gottlieb down  
18 as a primary user; right?

19 A Correct.

20 Q And you have not gone through your payment  
21 records, for example, and linked up exactly who has  
22 been paying for this; have you?

23 A I have actually seen our payment records.

1 Q But you didn't bring any of the payment  
2 records to court to match them up; right?

3 A No, we did not. No.

4 Q Obviously, you've never met Brett  
5 Gottlieb?

6 A No, I have not.

7 Q Okay.

8 MR. SUROVELL: I don't think I have any  
9 other questions, Your Honor. Just give me a moment  
10 to review my notes. Let me just ask a few more  
11 things.

12 BY MR. SUROVELL:

13 Q Ma'am, you left the company in 2004?

14 A Yes, in 2004.

15 Q When was that?

16 A It was the end of 2004.

17 Q The time you were gone --

18 A Yes.

19 Q -- you never used Network Solutions domain  
20 registration or renewal system; correct?

21 A Actually from 2004 to 2005, I did register  
22 a domain name with Network Solutions.

23 Q Was it some personal thing?

1           A     It was a personal domain name that I  
2     registered.

3           Q     In 2006, you never used the system; right?

4           A     No, I did not.

5           Q     So is it accurate to say that you're  
6     making an assumption that their system has worked  
7     the same from 2007 back to 2004?

8           A     Yes.

9           Q     Presumably there are people at the  
10    company that would know exactly what system was in  
11    place during that time frame because they built it;  
12    correct?

13          A     Correct.

14          Q     Now, relative to the services that you've  
15    described, the e-mail and the domain name services,  
16    before a week ago, did you have any knowledge of  
17    exactly where that information was stored?

18          A     No.

19          Q     So, in other words, you knew you were  
20    going to come to court and testify today, so you  
21    educated yourself to some extent about the way  
22    Network Solutions is doing things today?

23          A     Correct.

1 THE COURT: Let me say, that's to be  
2 encouraged.

3 MR. SUROVELL: Right.

4 THE COURT: I can't tell you how many  
5 times a witness gets on the stand and the lawyer,  
6 who puts the witness on the stand, has no idea what  
7 the witness is going to say.

8 MR. SUROVELL: Hopefully, that's not --

9 THE COURT: That's not every case.

10 MR. SUROVELL: -- that's not the way I try  
11 my cases.

12 BY MR. SUROVELL:

13 Q Can you turn to Exhibit 3? I have a  
14 question concerning Exhibit 3, the last page, page  
15 4.

16 A Yes.

17 Q It says on the right-hand side, something  
18 about "fraud status accepted." What is that about?

19 A It's just a fraud screening that we do,  
20 showing that the transaction was deemed to be non-  
21 fraudulent. It was an accepted transaction.

22 Q What does "line item" represent?

23 A The line item is the order ID that's

1 created at the time of that transaction.

2 Q Is that like an invoice number?

3 A No, it's not the invoice number. It's the  
4 order id. There is a separate invoice number.

5 Q Okay. It's an internal tracking mechanism  
6 for the company?

7 A Correct.

8 MR. SUROVELL: I don't have any further  
9 questions. Actually, no, I'm sorry. I do.

10 BY MR. SUROVELL:

11 Q Are you aware of the company's litigation  
12 pending in California?

13 A Briefly, yes, somewhat.

14 Q Okay. You're aware there's litigation  
15 outstanding there regarding this matter?

16 A Yes.

17 Q It doesn't sound like you're in the  
18 decision making process of that litigation; correct?

19 A No, I'm not.

20 Q Okay.

21 MR. SUROVELL: That's all the questions I  
22 have, Your Honor.

23 THE COURT: Redirect?

1 MR. McKAY: Yes, Your Honor, just a few.

2 REDIRECT EXAMINATION

3 BY MR. McKAY:

4 Q Ms. Sterling, there was a reference to  
5 VeriSign during cross examination questions. Would  
6 you look at Exhibit 4?

7 A Yes.

8 Q Does that reflect any reference there to  
9 VeriSign?

10 A It does. At the top of the page it  
11 states, "Network Solutions a VeriSign Company."

12 Q And at that point in 2003, was Network  
13 Solutions owned by VeriSign?

14 A Yes, they were.

15 Q And did that situation later change?

16 A Yes, it did.

17 Q And was Network Solutions spun off from  
18 VeriSign?

19 A Yes, they were.

20 Q You said in your response to Mr.  
21 Surovell's questions that you had reviewed the  
22 payment records for the account --

23 A Yes, I had.

1 Q -- of Nexus Holdings with the primary user  
2 of Mr. Gottlieb?

3 A Yes.

4 Q What did you see when you reviewed the  
5 payment records with respect to who was paying for  
6 those services?

7 MR. SUROVELL: Objection. It's hearsay.

8 THE COURT: I'm going to sustain the  
9 objection to hearsay.

10 BY MR. McKAY:

11 Q With respect to the registration process  
12 -- just to make sure I understand your testimony --  
13 from 2002 to 2004, you were familiar with what the  
14 registration process was while you were an employee?

15 A Yes.

16 Q And that that required you to check the  
17 box about having read and agreed to the service  
18 agreement?

19 A Yes.

20 Q And then through your own personal  
21 registration, you became familiar with the process  
22 in 2005?

23 A Correct.



1 Q At that time, did you have to go through  
2 the same process that you've described today?

3 A I did.

4 Q And when you returned in 2007, did you  
5 learn that the registration process included  
6 requiring you to check the box?

7 A Yes, I did.

8 Q And did you in 2007 learn anything about  
9 the process for renewing and what was required?

10 A Yes, I did.

11 Q Okay. What did you learn?

12 A It was the same process, that you would  
13 need to check that box in order to proceed to renew.

14 MR. McKAY: I don't have any other  
15 questions, Your Honor.

16 THE COURT: I thank you very much, Ms.  
17 Sterling. I appreciate your coming.

18 THE WITNESS: Thank you.

19 MR. McKAY: We have one other witness,  
20 Your Honor.

21 THE COURT: All right.

22 MR. McKAY: Mike Coccozza. He's just  
23 outside.

1 THE COURT: Let the deputy get him.

2 COURT CLERK: Please raise your hand to be  
3 sworn.

4 (Whereupon, the witness was sworn by the  
5 court's clerk.)

6 MR. McKAY: Your Honor, I'm going to hand  
7 Mr. Cocozza a set of exhibits that he may need to  
8 refer to.

9 THE COURT: All right.  
10 Whereupon,

11 MICHAEL VINCENT COCOZZA  
12 the witness, was called for examination by counsel  
13 on behalf of the plaintiff, and, after having been  
14 duly sworn by the clerk of court, was examined and  
15 testified as follows:

16 DIRECT EXAMINATION

17 BY MR. McKAY:

18 Q Mr. Cocozza, would you state your full  
19 name for the record?

20 A Michael Vincent Cocozza.

21 Q Would you spell your last name?

22 A C-O-C-O-Z-Z-A.

23 Q And where are you employed?

1 A Network Solutions.

2 Q What is your position?

3 A My title is Senior Director of  
4 Engineering. I run what we call the fulfillment  
5 system at Network Solutions.

6 Q What do the words "fulfillment system"  
7 mean?

8 A The fulfillment system is the part of the  
9 software system that actually goes out and fulfills  
10 the requests of what we call the storefront. The  
11 front-end website that the users interact with is a  
12 request based system. It passes requests to my  
13 system that actually goes out and, on behalf of the  
14 customer, it purchases or does the things the  
15 customer is asking it to do.

16 Q Take a moment and look at what is marked  
17 as Exhibit 1 in front of you. Separate it from the  
18 other exhibits so you can look at it. Just take a  
19 moment to look through this exhibit. Tell me if  
20 that's what you're referring to as the storefront?

21 A This is the storefront, yes.

22 Q And that's the storefront for a  
23 registration; is that correct?

1           A     The storefront flow for a registration,  
2     yes. This is a flow for a registration.

3           Q     All right. Look at Exhibit 2. Tell me,  
4     is Exhibit 2 a storefront flow?

5           A     This would be a renew services storefront  
6     flow, yes.

7           Q     "Renew service," is that what you said?

8           A     Yes.

9           Q     Now, I think what you testified to was:  
10    Your software that you supervise -- the process you  
11    supervise takes the commands or directions from  
12    those storefront entries and then executes them?

13          A     That's correct.

14          Q     Tell me, when did you come to Network  
15    Solutions?

16          A     In June of 2001.

17          Q     June of 2001?

18          A     Correct.

19          Q     And what was your title when you came?

20          A     Senior Engineering Manager.

21          Q     And from June of 2001 to today, have you  
22    been involved with what you call the fulfillment  
23    process?

1 A Yes, I have.

2 Q And have you become familiar in those  
3 duties with how the software works to fulfill the  
4 requests that a customer makes in the storefront  
5 process?

6 A Yes, I have.

7 Q You work with that software every day?

8 A Yes, I do.

9 Q All right. Would you describe for the  
10 court what the interaction is between a direction  
11 that the customer gives in your --

12 A Certainly.

13 Q -- software that you supervise?

14 A When a customer goes to what we call the  
15 storefront flows, the customer goes through a  
16 process of filling out the products that they want.  
17 They identify themselves. They put in information  
18 regarding credit card data. This is a purchase  
19 order transaction or a retail transaction. They  
20 then compose all of that information into what we  
21 call a request.

22 That request then gets submitted to the  
23 fulfillment system, itself. One of the first things

1 the fulfillment system does before it accepts an  
2 order -- we call that an order -- the fulfillment  
3 system will evaluate what it considers to be core  
4 artifacts inside of that data request.

5 Core artifacts would be -- You have to  
6 have a product that you actually want to do  
7 something with. There has to be a valid credit card  
8 as part of the request. And you also have to have  
9 checked -- In this particular case, you have to  
10 check a service agreement that says, "Yes, I have  
11 read and I have validated the service agreement."

12 That admission, or that acceptance, has to  
13 go past the core validation from the fulfillment  
14 system before the fulfillment system will even say,  
15 "Okay, I can take this and now do things on behalf  
16 of the customer."

17 If for any reason one of those core  
18 validation pieces of data are not in the request, we  
19 will send that request back to the storefront to  
20 then display the appropriate message to the user for  
21 them to fix the data condition. And then they move  
22 on.

23 Q This process of looking for certain

1 critical pieces of information, does your software  
2 look for that both in the registration and the  
3 renewal process?

4 A Yes, it does.

5 Q Now, look at Exhibit Number 1, at page 12.

6 A Yes.

7 Q Is that what you're describing with  
8 respect to the service agreement box that you  
9 described a moment ago?

10 A Yes, it is.

11 Q Now, what happens if a customer tries to  
12 move to checkout? How does your software operate  
13 when he tries to move to checkout without clicking  
14 on that box?

15 A Again, the system will review the material  
16 that the storefront sends back and simply indicate  
17 that not all of the required data is there for us to  
18 move forward on the fulfillment side. And it will  
19 turn back a response to storefront to message the  
20 customer that they need to take action.

21 Q Look at page 13.

22 A Yes.

23 Q Is that the kind of message that goes back

1 to the customer?

2 A That is the kind of message that goes back  
3 to the customer, yes.

4 Q Exhibit 2, take a moment to look at it.  
5 This a renewal -- you testified -- a renewal flow?  
6 Look at page 8.

7 A Yes.

8 Q Once again, is that the same process where  
9 there's a box there -- that that's the one you're  
10 referring to -- that had to be checked as a critical  
11 piece of information?

12 A Yes, it is.

13 Q And look at page 9. Tell us what that is?

14 A That would be the storefront's display  
15 back to the customer that they need to correct these  
16 fields on this submission form before the back-end  
17 system will accept it.

18 Q And given the way your software is  
19 configured, either on a registration or renewal, is  
20 it possible for a customer to bypass checking the  
21 box, "I have read the Network Solutions service  
22 agreement and agree to its terms"?

23 A No, it is not.



1 Q And what will happen each time that he or  
2 she tries to bypass?

3 A The fulfillment system will reject the  
4 request and send back the order to the storefront.

5 Q Do you have a process in Network Solutions  
6 where you learn if there are glitches or problems in  
7 your software?

8 A We do have a number of audit processes --  
9 most of them that I own -- that go through all the  
10 transactions that occur throughout our systems. And  
11 we evaluate basically all aberrations that are  
12 demonstrated in the system. And that is part of our  
13 review process of the operations of the system.

14 Q In the time that you've been working from  
15 2001 to 2007, and 2008 now with this software, have  
16 you ever had an aberration report that indicated  
17 that customers were able to bypass clicking the box  
18 about the service agreement?

19 A No.

20 Q Are you familiar with the process by which  
21 e-mail is transferred across servers on a Network  
22 Solutions e-mail account?

23 A I am familiar with them, yes.

1           Q     And how does that work? If I'm sitting in  
2 California and type on my computer to send an e-mail  
3 in my Network Solutions e-mail account, what  
4 physically happens?

5           A     Well, the e-mail will go -- I'm going to  
6 use a fairly nontechnical term, unfortunately -- it  
7 will be routed, or it will bounce around, to a  
8 number of different servers that end up at the  
9 Network Solutions core mail servers, that then send  
10 that material to the recipient. Based on the nature  
11 of the internet, there are what we call "hops" that  
12 the data can go to. But the target and the  
13 responsible party for the negotiation of that e-  
14 mail, is our e-mail servers. And they take  
15 responsibility for submission to the target  
16 location.

17          Q     Is it possible for a Network Solutions e-  
18 mail customer to send an e-mail from his computer  
19 that does not cross the Network Solutions servers?

20          A     No.

21          Q     And where are those Network Solutions  
22 servers located?

23          A     The Network Solutions servers for that are

1 located in our Savvis data center facility.

2 Q And what state is that?

3 A That's in Virginia.

4 Q Okay. And do you have knowledge of  
5 whether the system you just described, of those  
6 servers, where the servers have been located since  
7 2001?

8 A They have been primarily located in  
9 Virginia. When we made an acquisition of a company  
10 called Inquet, Inquet had a mail platform, as well.  
11 So there was a period of about six months in, I'm  
12 going to say, '04 or '05, where there was a subset  
13 of mail servers in the Boston area. And they were  
14 then moved back into the Savvis facility after the  
15 purchase went through.

16 Q So other than for that six month period,  
17 during the time that you've been at Network  
18 Solutions from 2001 to 2008, all e-mails from  
19 Network Solutions e-mail accounts had to go over a  
20 server in Virginia?

21 A That's correct.

22 MR. McKAY: No other questions, Your  
23 Honor.

1 THE COURT: Any cross examination?

2 MR. SUROVELL: Yes, ma'am.

3 CROSS EXAMINATION

4 BY MR. SUROVELL:

5 Q Good morning, Mr. Coccozza.

6 A Good morning.

7 Q I tend to be more visual when it comes to  
8 these things, as opposed to verbal. I'll try my  
9 best to be clear about exactly what your  
10 responsibilities are, relative to others.

11 A Sure.

12 Q The customer fulfillment system, is it  
13 accurate to say, is a separate system from the  
14 storefront?

15 A It is a separate code base from the  
16 storefront; yes, that is correct.

17 Q And the storefront code base is a  
18 different person's responsibility?

19 A That is correct.

20 Q Just so we're clear: We're talking about  
21 right now, the way the system is set up right now.  
22 When somebody enters information into the storefront  
23 and clicks the button here on Exhibit Number 1, page

1 12, "secure checkout" --

2 A Yes.

3 Q -- the storefront sends -- I don't know  
4 the software word, but -- a chunk of data to your  
5 system.

6 A That works.

7 Q Okay. What does that chunk of data  
8 actually look like?

9 A Are you asking for the binary  
10 representation? The requests come in, basically XML  
11 packets. And the target system, or the fulfillment  
12 system, decomposes that XML data. And then it does,  
13 again, the validation step. And then it takes that  
14 data into its internal queues and databases. Is  
15 that answering your question on that?

16 Q Yes.

17 A Okay.

18 Q Part of that XML data then would be, I  
19 guess, whether or not a positive response was  
20 indicated for the service agreement check box?

21 A Yes.

22 Q Exactly what does it say? Check box  
23 "yes," or check box "1" or "0," or something like

1     that?

2           A     We call this -- In XML there is name value  
3     pairs, effectively, where you have a specific tag,  
4     "Mike, John, Pete, and Mark." And you're always  
5     looking for those tags on the left. And you have  
6     values on the right. And you know, based on having  
7     written the code, whether you're looking for a "yes"  
8     or a "no" response in Mike, or a "blue" or a "green"  
9     response in Mark. So that's the type of evaluation  
10    on those core pieces that the fulfillment system  
11    goes through. It evaluates a series of name value  
12    pairs. All of those need to result to "true"  
13    effectively in the software system before it moves  
14    forward.

15          Q     In that piece of data that you're talking  
16    about, the XML package that's sent, that indicates  
17    that that checkbox was indicated, that's actually a  
18    piece of data that the company could archive if they  
19    chose to; correct?

20          A     If the company were to write software to  
21    do that, yes, we certainly could. We could always  
22    archive more; I'm sure about that.

23          Q     The company does not archive that specific

1 piece of code that's generated to indicate the  
2 positive is sent when the secured checkout button is  
3 clicked?

4 A That is correct.

5 Q And you would agree that the company's  
6 website, the storefront, has changed through the  
7 years; correct?

8 A Yes, it has.

9 Q Okay. And you've never been in charge of  
10 that storefront?

11 A That's correct.

12 Q Would you agree, also, that it would be  
13 possible for the company to determine whether or not  
14 a specific person signing up for a domain or  
15 renewing a domain had checked on the hyperlink for  
16 the Network Solutions service agreement?

17 A I'm sorry. Can you ask the question  
18 again?

19 Q You would agree that it would be possible  
20 for the company to determine whether or not a person  
21 registering for a domain name or renewing it, had  
22 checked on the Network Solutions service agreement  
23 link, for example, shown on page 12?

1           A     There are absolutely techniques that you  
2     can implement that would allow you to track any user  
3     action, yes.

4           Q     Right. Okay. And that's not something  
5     that the company tracks; is it?

6           A     That is not something that the company  
7     tracks.

8           Q     Now, you said a second ago the company has  
9     audit processes regarding, I guess, your fulfillment  
10    functions; right?

11          A     That's correct.

12          Q     In order for something to come to your  
13    attention, though, the system would have to indicate  
14    some kind of a problem; correct?

15          A     That's correct.

16          Q     Computer systems sometimes have problems,  
17    but don't make any noise about it -- for lack of a  
18    better term -- right?

19          A     That is certainly possible, yes.

20          Q     Okay. So all you're saying today is that  
21    nobody has ever brought to your attention the fact  
22    that people were getting through the system without  
23    clicking the box; right?



1           A       What I am saying is that through the  
2       investigations that my team does, we have never seen  
3       artifacts in the system that indicated that this  
4       behavior was possible or ever occurring. We also  
5       have QA departments that constantly go through, in  
6       preparation for every release, what they consider  
7       not only new functional testing, but what we  
8       classify as regression testing. This ability, or an  
9       enablement of this function, has never been  
10      described or identified that it was ever possible.  
11      Nor has there been through customer service, which  
12      is also another feedback into engineering,  
13      indicating that -- They have direct lines to the  
14      customers that say, "Hey, we're noticing that this  
15      is occurring."

16           Q       How many different iterations of your  
17      fulfillment system have you been through since 2004?

18           A       That's a tough one to answer. Let me try  
19      to answer it this way: We average about four what  
20      we call major releases per year. And that is  
21      defined as material changes to logic inside of  
22      somewhere in the fulfillment system. And it's a  
23      very large and distributed system. The piece that

1 we're talking about specifically here, has been  
2 quite static for quite a long time. But the system  
3 changes.

4 Q Wouldn't you agree, though, that in your  
5 experience as a software engineer, that lots of  
6 times a major change can have an impact on a static  
7 system that somebody didn't foresee?

8 A Which is one of the primary reasons that  
9 we have regression test sweeps in our QA  
10 environment, to circumvent that type of thing. The  
11 answer is "yes." But I believe from a software  
12 engineering standpoint, Network Solutions has taken  
13 appropriate steps to mitigate that risk.

14 MR. SUROVELL: I don't have any further  
15 questions, Your Honor.

16 MR. McKAY: Any redirect?

17 MR. McKAY: Just two, Your Honor.

18 REDIRECT EXAMINATION

19 BY MR. McKAY:

20 Q If Network Solutions maintained the kind  
21 of data that Mr. Surovell was asking about, which is  
22 data to show every customer who checked on the box  
23 and whether every customer went to the hyperlink,

1 what would be the burden of maintaining that kind of  
2 information?

3 A There are a number of different impacts  
4 that would need to be evaluated and likely would be  
5 somewhat significant. You have what we call  
6 storefront load, the amount of resources consumed on  
7 the servers that serve up these pages. The more we  
8 track -- The more data that we actually track on the  
9 storefront servers, it effectively reduces the  
10 number of users and the response time to the users  
11 that we can actually give. Because you only have a  
12 certain amount of raw resource to use.

13 It also consumes much more of what we  
14 would call disk space. We would have to log that  
15 event somewhere on the actual physical machines,  
16 themselves. So policies and procedures would need  
17 to be modified to review the additional disk space  
18 usage over time and adjust archival policies over  
19 time for that.

20 Q With respect to the releases that have  
21 come into place over the time you've been at Network  
22 Solutions, with respect to the fulfillment software,  
23 during the time that you've been working between

1 2001 through 2008, now, with that fulfillment  
2 software, has there always been in place a rule that  
3 said that clicking the service agreement would  
4 generate an error message, if someone tried to go  
5 through without clicking that box?

6 A Yes.

7 MR. MCKAY: No other questions, Your  
8 Honor.

9 THE COURT: All right. Thank you very  
10 much, sir. I appreciate you coming.

11 THE WITNESS: Thank you.

12 THE COURT: Any further evidence for the  
13 plaintiff?

14 MR. MCKAY: None, Your Honor.

15 THE COURT: Any further evidence for the  
16 defense?

17 MR. SUROVELL: Could you just give me a  
18 minute, Your Honor, to think about these pleadings.

19 THE COURT: You can step down, sir.

20 THE WITNESS: Thank you.

21 THE COURT: In fact, you can leave the  
22 courtroom, if you would like.

23 I'll tell you what: What I'll do is I'll

1 take our morning recess now. You can ponder during  
2 that time whether you want to put on any more  
3 evidence. And if so, we'll take it. If not, when I  
4 come back, we'll have closing arguments.

5 MR. SUROVELL: I don't have any more  
6 evidence.

7 THE COURT: All right. We will,  
8 nonetheless, take a fifteen minute recess.

9 MR. SUROVELL: Okay.

10 THE COURT: Once you announce that, it's  
11 hard to retract it. We'll start back in fifteen  
12 minutes with closing arguments.

13 MR. SUROVELL: Thank you, Your Honor.

14 MR. MCKAY: Thank you.

15 (Whereupon, there was a brief break in the  
16 proceedings.)

17 THE COURT: Closing argument, Mr.  
18 Surovell?

19 MR. SUROVELL: I'm happy to report to Your  
20 Honor that at least with most of the counsel, there  
21 is a record presence in this room during the  
22 proceedings today, everybody is from UVA Law,  
23 including Your Honor.

1 THE COURT: Absolutely everybody here is  
2 from UVA Law?

3 MR. SUROVELL: Everyone except --

4 MR. McKAY: We have some lawyers here who  
5 are not, but --

6 THE COURT: Well, I was going to make a  
7 snooty statement about UVA Law, but now I won't.

8 MR. SUROVELL: And I hope this hearing  
9 doesn't keep you up, like my last one we had.

10 THE COURT: Good.

11 MR. SUROVELL: Actually, I've got more  
12 depositions tomorrow about bed bugs.

13 THE COURT: Mr. Surovell is referring to a  
14 trial I had with him about a year ago, which he was  
15 representing the plaintiff in a case. She was  
16 alleging she was injured by a bed bug infestation at  
17 the hotel where she had been staying for a long  
18 period of time. And I have never been able to enjoy  
19 a good night sleep in a hotel since then.

20 MR. McKAY: Particularly in a hotel.

21 THE COURT: Yes, that's right. In my own  
22 home, I'm fairly confident; but not in a hotel.

23 MR. SUROVELL: I've got more depositions

1 about bed bugs tomorrow.

2 Your Honor, I'm not sure exactly in what  
3 order to handle these. But I guess I'll start off  
4 with: To some extent, at least legally, there is  
5 some interrelationship between the contract  
6 provisions and the constitutional due process  
7 issues. I guess I'll start with the constitutional  
8 due process issues, because that sort of trumps  
9 everything, I think.

10 Your Honor, I know, is familiar with the  
11 minimum contacts International Shoe analyses that  
12 overrides all of our concerns here today. I hope  
13 the court is familiar with the Burger King versus --  
14 I don't know how to pronounce it -- Rudzewicz case,  
15 something like that. In that opinion, the U.S.  
16 Supreme Court made clear that simply having a  
17 contract with somebody is not sufficient to confer  
18 constitutional due process minimum contacts upon a  
19 transaction. You still have to look beyond that.  
20 You have to look at the substance and nature of the  
21 relationship, not just the contract to get through  
22 to the constitutional due process part of this.

23 The case that we submit, that probably has

1 the tightest bearing on this, is the -- I don't know  
2 if Your Honor -- There are a lot of cases cited by  
3 both sides -- America On-Line versus ICQ case, which  
4 was the Judge Ellis opinion, Eastern District in  
5 2000.

6 That case involved a situation where -- it  
7 involved actually I believe the same company,  
8 Network Solutions -- where Judge Ellis found that  
9 simply maintaining a domain name through Network  
10 Solutions does not create personal jurisdiction over  
11 a company. That company registers their domain with  
12 Network Solutions. That does not create personal  
13 jurisdiction. That's not enough.

14 The forum selection clause, I don't  
15 believe is mentioned in the opinion. But they did  
16 talk a lot about the nature of contacts, which is a  
17 little bit different in that case. In that case,  
18 all they were doing was domain hosting. They  
19 weren't doing the e-mail service.

20 But in that opinion, Judge Ellis noted  
21 that Network Solutions wasn't acting as an ISP with  
22 the amount of interaction between Network Solutions  
23 and the litigant in that case. It was pretty



1 minimal. There was a small annual fee, which was  
2 paid regularly in that case. And it also pointed  
3 out, in that opinion, that -- And I have a copy of  
4 it, if you want me to hand it up.

5 THE COURT: Yes, that would be good.  
6 Thank you.

7 MR. SUROVELL: Judge Ellis also pointed  
8 out that --

9 THE COURT: Wasn't the case about a third  
10 party that was trying to glom onto the forum  
11 selection policy?

12 MR. SUROVELL: Exactly. Right. And he  
13 also talked about the fact that Network Solutions'  
14 location being in Virginia, did not appear to be a  
15 material term or of any significance to that  
16 litigant. In terms of they weren't looking for  
17 somebody in Virginia or something like that.

18 And, also, there isn't any indication of  
19 any negotiations or discussions between the person  
20 prior to the domain name being registered, which is  
21 also pretty similar to this case. The record you  
22 have before you shows that they're not aware of any  
23 discussions, any negotiations, or any contact.

1           In fact, I think if you look carefully at  
2     the record that you have before you, Your Honor, the  
3     only evidence that Your Honor has is that somebody,  
4     a person, put into their computer network, a name of  
5     "Nexus Holdings" as an account owner of a domain  
6     name, and registered an e-mail account in the name  
7     of Brett@NexusHoldings.com. And that somebody put  
8     into that system that Brett Gottlieb is a primary  
9     user for that account. That is, more specifically,  
10    exactly, what record Your Honor has before you  
11    today. And that, plus an affidavit of Mr. Gottlieb  
12    saying that he has never been to Virginia --

13           THE COURT: Well, don't I have -- Isn't it  
14    in the pleadings in the admissions that Nexus  
15    Holdings is simply a trade name, not a separate  
16    corporation; correct?

17           MR. SUROVELL: I believe the complaint is  
18    directed to Nexus Holdings, LLC.

19           MR. MCKAY: It's footnote 1 to the opening  
20    brief that the judge is referring to.

21           THE COURT: I thought I read that Nexus  
22    Holdings is simply a trade name.

23           MR. SUROVELL: In our brief?

1 MR. MCKAY: Yes, it's footnote 1.

2 MR. SUROVELL: Okay.

3 MR. MCKAY: There exists no such entity.

4 MR. SUROVELL: Yes. I don't think anybody  
5 thinks there's actually an entity anywhere that's  
6 named Nexus Holdings. What's the page, Your Honor?

7 MR. MCKAY: Page 1, footnote 1.

8 MR. SUROVELL: Got it. I guess that's not  
9 actually in evidence. But I guess Your Honor could  
10 take notice of it. I mean it's filed in connection  
11 with this specific part of the proceedings, so I  
12 guess Your Honor could take judicial notice of it,  
13 technically. But, in any event, Your Honor, that's,  
14 I guess, part of the record.

15 Now, relative to the forum selection  
16 clause, Your Honor, I think you have to look at the  
17 clause carefully. In some ways, I think, it's a  
18 little bit inartfully worded, in that it says that  
19 the parties are subjecting themselves to the  
20 jurisdiction of the Eastern District of Virginia.  
21 And then it says, "Or, if there is no jurisdiction,  
22 under Fairfax," which I think would require the  
23 plaintiff to put on some showing that there's no

1 jurisdiction in federal court, before they're  
2 entitled to be in this court.

3 It's kind of a fuzzy situation, because  
4 both courts are in Virginia. And that might also be  
5 something for a subsequent motion to this hearing,  
6 in terms of whether this is the right court, or  
7 federal court is the right court. Obviously, both  
8 courts are in Virginia. But, to some extent, Your  
9 Honor, the exact contract provision is a little  
10 fuzzy in that it doesn't clearly state "Virginia."  
11 It talks about different parts of Virginia. I would  
12 just submit that there hasn't been any showing from  
13 the plaintiff as to whether or not there's --

14 THE COURT: Network Solutions has said  
15 they would rather be in federal court. But barring  
16 that, they'll reluctantly agree to be in the Fairfax  
17 Circuit Court. But they don't want to be in  
18 California or anywhere else.

19 MR. SUROVELL: Right. The only evidence  
20 right now you have about that, is that there is some  
21 litigation pending in federal court in California,  
22 which I believe their employee testified that she  
23 knew about. She didn't get much more specific than

1 that, which, to some extent, suggests that there's  
2 at least a potential for jurisdiction in the Eastern  
3 District of Virginia. But, again, I think that's  
4 their burden, because it's their contract. In order  
5 to get under their provision, that they have to --  
6 They haven't presented, I don't think, any evidence  
7 about federal jurisdiction or whether or not they're  
8 out of federal jurisdiction.

9 If anything, Your Honor, I think the terms  
10 of the minimum contacts, transacting business  
11 provisions, I think what you have here is -- you  
12 know, the evidence they've presented shows that  
13 somebody put this information into the system. It's  
14 not clear who paid for it or how it was paid for,  
15 because there wasn't any record of that today. All  
16 you have in front of you is that somebody put Brett  
17 Gottlieb's information into this system. And, I  
18 guess, that it has been used. They don't know by  
19 who; but it has been used.

20 And, Your Honor, we would submit that  
21 that's insufficient to confer personal jurisdiction  
22 over our client, Brett Gottlieb, based on the record  
23 you have in front of you at this time.

1           Now, the general appearance issue, Your  
2 Honor: It would be a lot nicer if the rules of  
3 court were a lot clearer, or if the Supreme Court  
4 would help give us some guidance on this, better  
5 than what they've done, instead of fuzzy cases over  
6 two hundred years. In once sense the Supreme Court  
7 talks about "If you do anything besides contest  
8 personal jurisdiction, you're potentially creating a  
9 general appearance." On the other hand, it's  
10 virtually impossible to schedule this hearing  
11 without doing something else. So there has to be a  
12 line somewhere that relates, you know, at some point  
13 -- If you're trying to contest personal  
14 jurisdiction, I mean, you have to be able to do  
15 something to contest it. I'm sure this court  
16 wouldn't want us filing ten page memos and showing  
17 up for a three hour hearing on a Friday. I'm sure  
18 the court would prefer that we call calendar control  
19 instead of not.

20           And so doing those kinds of things  
21 couldn't possibly be inconsistent with contesting  
22 personal jurisdiction, because they are sort of done  
23 in furtherance of it. Likewise, getting the

1 response date extended so that a frivolous pleading  
2 isn't filed, or that the correct pleading is filed,  
3 shouldn't be construed as the kind of substantive  
4 response which gets you into a general appearance.

5 Obviously, my client didn't file a grounds  
6 of defense or a demurrer, which I think my client  
7 would submit would be clearly waivers of personal  
8 jurisdiction.

9 I believe Network Solutions counsel cited  
10 a moment ago to a case which involved a continuance.  
11 I think it was a 1902 case. I'm not sure exactly  
12 what that court's procedures or docket methods or  
13 whatever were, back in those days. I would submit  
14 that whatever the procedures were back in those  
15 days, they were probably quite different from what  
16 they are today. So you might need to continue a  
17 hearing before you file any kind of a pleading. But  
18 I would submit that asking for whatever kind of  
19 continuance that was, is not the same thing as  
20 asking for an extension of time to file your  
21 objection to personal jurisdiction.

22 So I would submit that whatever was done  
23 in this case, was done solely in furtherance of

1 objecting to personal jurisdiction, including the  
2 deposition notice, Your Honor, which, as I pointed  
3 out earlier, was simply done in furtherance of  
4 putting together evidence to present today. It was  
5 not a discovery deposition. It was solely an  
6 attempt to do a de bene esse deposition for Your  
7 Honor's benefit. So I would submit that none of  
8 those actions constitute the entry of a general  
9 appearance.

10 And the last thing I'll just say, Your  
11 Honor, before reserving for response, is clearly  
12 there is this other litigation going on in federal  
13 court in California. And I think the court needs to  
14 take notice of that. The last thing we want is  
15 different courts arriving at different results; one  
16 court saying they have jurisdiction, and the other  
17 court saying they also have jurisdiction. Then  
18 we're in a mess.

19 I know that technically -- state courts, I  
20 think, stand at parity relative to each other. Your  
21 Honor, in a federal court, to some extent -- I know  
22 my father has a lot of funny federal judge jokes  
23 about how the federal judges think they have --



1 especially relative to state court judges -- how  
2 they can overrule a state supreme court with a  
3 strike of the pen, et cetera. But, I think to some  
4 extent, the federal court sits -- to some extent --  
5 sits over a state court, in terms of its ability to  
6 stay a proceeding or move it along or whatever. I  
7 think that's something this court needs to take into  
8 account, in terms of whether or not to proceed on  
9 this.

10 But, again, I can't file a motion or do  
11 anything about it, other than to point it out and  
12 say something here in court today, because of my  
13 concern that we may enter a general appearance by  
14 asking you to do something about it.

15 THE COURT: I think your purpose here  
16 today is to contest the jurisdiction of this court.

17 MR. SUROVELL: Right.

18 THE COURT: I think you don't need to  
19 mince words.

20 MR. SUROVELL: Right. So that's all I  
21 have for now, Your Honor. I would reserve for  
22 argument, based on whatever Network Solutions  
23 argues.

1 THE COURT: All right. Let me hear from  
2 Network Solutions.

3 MR. McKAY: Your Honor, let me deal with  
4 really the last thing first, which is this  
5 California issue. If Your Honor looks at the last  
6 page that's attached to the reply that was filed by  
7 the defendant, they've attached one page of the  
8 California proceeding. And you'll see that that's a  
9 Doe case. And I'm not sure how the court is  
10 supposed to extrapolate from that that anything is  
11 going on with respect to Mr. Gottlieb, because Doe  
12 is the plaintiff in that reported class action.

13 And as I said in beginning remarks this  
14 morning, the issue for this court is really today  
15 just one of jurisdiction. You're not in a position  
16 where you have to face issues about which court has  
17 precedence on this case, or on whose case should go  
18 forward. There is no stay motion, as Mr. Surovell  
19 has said he could not file. And that's because you  
20 have only one preliminary issue to decide, which is  
21 jurisdiction; and that's the only issue before you.

22 Your Honor, taking the points -- I'm going  
23 to take them in a little different order than Mr.

1 Surovell did. I'm taking them in the order that's  
2 in our brief.

3 The general appearance: You know, I would  
4 admit that it is a harsh rule sometime. But we all  
5 have to play by what the rules are. And if you look  
6 at The City of Portsmouth case, which is a Circuit  
7 case, 69 Va. Cir. 397, Judge Sword said, in 2005, he  
8 had done a survey of Virginia law on this issue, and  
9 found that basically any pleading, other than  
10 pleading necessary to contest jurisdiction, was a  
11 general appearance. And he cited, in his litany of  
12 cases that he had reviewed, the Kaiser case, which  
13 is a Virginia Supreme Court case that, Your Honor,  
14 we did not cite in our pleadings. We cited a 1902  
15 case.

16 This actually brings us several decades  
17 later. This is a 1938 case. It's 169 Va. 574. And  
18 the pertinent part is 591. And back then, the  
19 Virginia Supreme Court said, again, as they had in  
20 1902, that requesting or conceding to a continuance,  
21 was a general appearance.

22 And in this case, the request for a  
23 continuance, or a resetting of the date for a

1 pleading, I do not believe made any reference to the  
2 fact that more time is needed to contest  
3 jurisdiction. I think there was simply a statement  
4 that a continuance was needed. We agreed to it. It  
5 came in as a praecipe with the court.

6 And, of course, beyond that, that invokes  
7 the court's processes to some extent, because the  
8 court had to agree to that.

9 But, then, they went specifically to the  
10 court and asked the court to give him more pages.  
11 Once again, this was invoking the processes of the  
12 court and the discretion of the court. And we  
13 actually had to have a little hearing on that before  
14 the judge in chambers on the telephone to do that.

15 And then the last thing was the deposition  
16 notice. There was no need for that deposition  
17 notice. All that had to occur was that Mr. Gottlieb  
18 had to come here to testify.

19 So all those acts were voluntary. And I  
20 think when you take any one of those, and certainly  
21 when you take all three of them, there was a general  
22 appearance.

23 And that leads me to one point, Your

1 Honor: I took several notes while Mr. Surovell was  
2 talking about this notion that we hadn't proved this  
3 or we hadn't proved that, that the record was  
4 inadequate, and for all that you could see, this man  
5 might have done a whole bunch of things. If he  
6 didn't sign that agreement, click on it, he needed  
7 to come here and tell you that. And he chose not to  
8 do that.

9 And, in fact, in his pleadings, he  
10 indicated to the court that he did enter into this  
11 contract with Network Solutions. He said on page 5  
12 of his opening memorandum that "The execution of the  
13 forum contract took place on defendant's computer in  
14 San Francisco when he checked a box."

15 On page 3 of that same pleading, he says  
16 that "The defendant registered a private domain name  
17 and e-mail account in October 2003, and renewed the  
18 registration each year until this year." To do the  
19 registration and the re-registration, the defendant  
20 used his computer in California to access the  
21 internet, where he filled out a form with his  
22 contact and credit card information.

23 So I really don't know why we're

1 speculating about whether there needs to be proof of  
2 what this man did. He either should have come and  
3 said it, or maybe he knew he couldn't say anything  
4 because of what he said in his pleadings, which was  
5 to the contrary.

6 So I think what you have before you is a  
7 record that Mr. Gottlieb has had services from  
8 Network Solutions. He has had them since October  
9 2003. He not only registered in 2003, but instead  
10 of taking a five year registration, he took a one  
11 year registration every year. So every year he has  
12 come back and reregistered.

13 And there is undisputed proof that to get  
14 to the point where he actually bought those  
15 services, he had to click on that box. And that was  
16 true at the time of the registration. And it was  
17 true at the time of the renewal.

18 Whether he read the contract or not -- And  
19 there were questions, "Did we have information in  
20 our records to show that he did read it?" Because  
21 of the burden, we don't keep that kind of  
22 information. Whether he read it or not is his  
23 business. But to get the services --

1 THE COURT: Well, there are old Virginia  
2 cases, which an illiterate person signed a contract  
3 with an "X." And the Supreme Court said that if he  
4 was unable to read the contract, it was his  
5 obligation to get someone who could read it to him.

6 MR. McKAY: Yes, Your Honor. And in the  
7 electronic age, the Weingrad case that we cited from  
8 the Southern District of New York, which actually  
9 was this very clause, in this very contract with  
10 Network Solutions, said that the fact that you  
11 didn't read it, that was your problem. If you  
12 didn't read it, you took the risk. And that's  
13 exactly in conformance with the cases that you're  
14 citing from the Virginia Supreme Court. In the case  
15 of Weingrad, the court said that the signatory is  
16 presumed to have read, understood and agreed to be  
17 bound by the terms, including the forum selection  
18 clause. They cited several cases to that effect.

19 So I think what you have in front of you  
20 is the undisputed fact that he bought the services,  
21 he bought them at a relatively nominal charge. And  
22 in part, that charge is kept low because it is a  
23 forum selection clause. He bought the services. He

1 repurchase them every year under an agreement where  
2 there has been no attack today, no showing,  
3 whatsoever, not even in argument, that the clause is  
4 somehow unenforceable.

5 So on that basis alone, in addition to a  
6 general appearance -- You can find on either the  
7 general appearance grounds or the forum selection  
8 clause, which is basically a consent to  
9 jurisdiction, that there was jurisdiction here.  
10 And, certainly, we've made the prima facie showing  
11 that a number of the cases talk about.

12 Now, Mr. Surovell, I think is saying that  
13 it's not enough that you can consent. But we cited  
14 cases to Your Honor, in particular the Frontline  
15 case at 10 F.Supp. 2d 583, that says that personal  
16 jurisdiction is waivable. And it doesn't become a  
17 constitutional issue if you waive and agree to  
18 appear.

19 I, for example, Your Honor, could agree to  
20 appear in Alaska, and have no contacts whatsoever  
21 with Alaska. But if I agree to go there, I think  
22 constitutionally there's no issue, because I've  
23 agreed to go there. And that's what happened in



1 this case when he clicked on the agreement in order  
2 to be able to buy the services.

3 And weighing -- As Your Honor pointed out,  
4 there are several distinctions. First of all, it  
5 didn't involve Network Solutions' attempt to enforce  
6 its forum selection clause. It involved a third  
7 party, I think AOL, trying to say, "Well, because  
8 they signed a contract in Virginia with some other  
9 company and signed a forum selection clause, that  
10 somehow that's no contact with Virginia." That  
11 troubled Judge Ellis. As did the fact that nothing  
12 happened in that case, other than the one time  
13 registration, I think it was, of two different  
14 domain names.

15 And that's very different than this case.  
16 Because the testimony you've heard is that every  
17 time Mr. Gottlieb has sent e-mails for the past five  
18 years -- four and a half years -- he has sent them  
19 over servers that were always in Virginia, except  
20 for one six month period when there might have been  
21 servers in Boston.

22 And, Your Honor, in the service agreement  
23 that he agreed to, if Your Honor looks in each of

1 the Exhibits 4 through 8, every one of them talks,  
2 in the first paragraph introduction, about  
3 "Performance of services will occur at our offices  
4 in Herndon, Virginia." It's near the very bottom of  
5 Exhibit 4. It appears roughly in the same place in  
6 every one of those clauses. So if this man read --  
7 if he didn't read, he should have read this  
8 contract, seeing that he was dealing with a Virginia  
9 company that was going to provide services in  
10 Virginia. And he chose to purchase those services  
11 and take advantage of them.

12 So I don't believe that due process  
13 considerations come into play where you've got  
14 consent. But even if they did, there's more than an  
15 ample basis here to find the minimum contacts,  
16 because of the repeated use of services of a company  
17 that he knew was in Virginia, over a long period of  
18 time, and sending his e-mails across servers that  
19 were located in Virginia.

20 That federal court question, seems to me  
21 to be just irrelevant. If you look at our  
22 complaint, we're trying simply to get Mr. Gottlieb  
23 to honor his contract. And in our declaration, he

1 has to bring whatever complaint he wants to bring in  
2 Virginia. It was not possible to find the \$75,000  
3 jurisdictional amount, so we were in a position  
4 where the case could not be brought in federal  
5 court. And so we brought it in this court. And if  
6 they want to remove it to federal court, or if they  
7 want to sue us in federal court and maintain that  
8 they have federal court jurisdiction, that's their  
9 prerogative. But where we stood, under the clause,  
10 there was no option except to bring it in this  
11 court. And we believe that the court --

12 THE COURT: So you're asking for  
13 declaratory judgment that Virginia, wherever in  
14 Virginia, is the proper forum, as opposed to this  
15 court is the proper forum?

16 MR. McKAY: Well, Your Honor, we believe  
17 that this court is the proper forum, because of the  
18 circumstances. But our declaration, taking those  
19 circumstances into effect, says it is this court.

20 But if they have a case that can be  
21 brought in federal court in Virginia, they can bring  
22 that case in federal court. And we'll deal with  
23 whether it's properly there or properly here.

1 But our declarations of the forum clause  
2 is enforceable and binds him to follow its dictates.  
3 If he can gin up federal court jurisdiction, then  
4 the case can be brought in Alexandria. If he can't,  
5 then the case has to be brought here; that's what  
6 the declaration seeks.

7 THE COURT: I understand your position.  
8 Mr. Surovell, is there anything further?

9 MR. SUROVELL: Two quick points, Your  
10 Honor. In the Burger King case, which I cited a  
11 minute ago, the U.S. Supreme Court case, I don't  
12 believe that case says that a contractual consent  
13 gets you around the due process position. And I'm  
14 not aware of any U.S. Supreme Court authority to the  
15 contrary. But I haven't carefully researched it  
16 either. I'm counting on co-counsel to point it out  
17 if it has, on this specific point.

18 But in that case, Your Honor, they said in  
19 that case -- and I'm quoting from it -- they're  
20 talking about a choice of law provision. They go on  
21 to say that "Although such a provision standing  
22 alone would be insufficient to confer jurisdiction,  
23 we believe that when combined with the twenty year

1 independent relationship of Rudzewicz with Burger  
2 King's Miami headquarters, it reinforces its  
3 deliberate affiliation with the forum state and  
4 reasonable foreseeability of a possible litigation."  
5 And I think they're just saying in that case that  
6 you have to have -- the minimum contacts analysis  
7 really relates to the purposeful activity directed  
8 at the forum. I don't think a contractual provision  
9 gets you to home plate. It certainly helps. But I  
10 don't think it gets you to home plate.

11 In any event, the last point I want to say  
12 regarding the point that Mr. McKay just said: This  
13 forum selection clause they've got here, will  
14 entitle it to governing law. I guess it's combined  
15 governing law and forum selection clause.

16 And I've seen -- A lot of these things, I  
17 think, can be sort of deceptive. You might think  
18 they say one thing, when they really say another.  
19 But the way this one is worded -- And it's their  
20 contract. They wrote it. I think that they're  
21 stuck with it. It says that this is governed by the  
22 laws of the Commonwealth of Virginia. That's the  
23 first sentence, which tests of governing law. And I

1 believe all four of them are the same. Although I  
2 haven't gone through and compared them.

3 Then it says, "You and we each agree to  
4 submit to the exclusive subject matter and  
5 jurisdiction, personal jurisdiction, and venue of  
6 the United States District Court for the Eastern  
7 District of Virginia, Alexandria Division, for any  
8 disputes between us, under or arising out of this  
9 agreement."

10 And then it says, "If there is no  
11 jurisdiction in the United States District Court for  
12 the Eastern District of Virginia, Alexandria  
13 Division, for any disputes between --"

14 THE COURT: You need to slow down. The  
15 court reporter can't take down what you're saying  
16 when you read so quickly.

17 MR. SUROVELL: Yes. She always tells me  
18 that after court.

19 THE COURT: It's a natural tendency when  
20 people are reading, to read very quickly, forgetting  
21 that the court reporter can only go so fast.

22 MR. SUROVELL: All right. But the second  
23 sentence, Your Honor, says that basically if there

1 is no jurisdiction in federal court, you and we then  
2 agree that jurisdiction shall be in Fairfax County  
3 -- the courts in Fairfax County, Fairfax, Virginia.

4 And what I think that does, Your Honor, is  
5 that, to some extent, sets what their burden of  
6 proof is in the hearing today. This is their  
7 contract. In order for them to meet the burden of  
8 their contract, I think they have to disprove  
9 federal jurisdiction as part of this case. I'm not  
10 confident that they've presented this court with  
11 sufficient information. In order to do that, I  
12 guess to some extent they're arguing you should just  
13 look at the file and figure that out from looking at  
14 the file.

15 By the way, relative to some of the  
16 assertions that were made in the pleadings, it's not  
17 clear to me that those are necessarily -- simply  
18 predicting what the record is going to be in a  
19 proceeding, does not necessarily tie your hands as  
20 to what your version of the evidence is. So it's  
21 not clear that those statements made in those  
22 pleadings necessarily constitute the kinds of  
23 judicial admissions that Network Solutions thinks

1 they are or asserts they are.

2 So, in any event, Your Honor, that's the  
3 only rebuttal that I have. I would just note that I  
4 hope that if anybody is keeping score in terms of  
5 the objections, that doesn't -- I went down pretty  
6 hard there. Hopefully, that doesn't predict the  
7 outcome. I would ask that Your Honor find that  
8 there is no personal jurisdiction.

9 THE COURT: All right. I am going to  
10 overrule the plea in bar. I do think that there is  
11 personal jurisdiction here.

12 As far as the general appearance -- I  
13 might be in a minority on this -- but I think it  
14 needs to be a pleading to the merits of the case,  
15 which is the same argument that I made  
16 unsuccessfully to Judge Middleton about twenty years  
17 ago. It needs to be pleadings of the merits of the  
18 case. For example, an answer that was filed, or  
19 something along those lines that was filed, not  
20 contesting jurisdiction. And I don't think asking  
21 for more time to file your response to pleadings is  
22 a general appearance. I know I'm in a minority on  
23 that. But barring further guidance from the Supreme



1 Court, that's ruling on that.

2 But I do think the forum selection clause  
3 is valid and is enforceable. And I believe that  
4 Virginia has long arm jurisdiction over the  
5 defendant under the long arm statute, both under the  
6 doing business in Virginia clause and under the  
7 subsection B about using the computer network  
8 located in Virginia.

9 And I don't believe that the exercise of  
10 personal jurisdiction under Virginia's long arm  
11 statute violates any concepts of due process. I  
12 think there is sufficient memo contacts with the  
13 state.

14 So for those reasons, I'm overruling the  
15 plea in bar.

16 Could you submit an order before you leave  
17 today?

18 MR. MCKAY: Yes, Your Honor.

19 THE COURT: All right. Thank you very  
20 much.

21 MR. SUROVELL: Thank you, Your Honor.

22 THE COURT: Court is adjourned.

23 (Whereupon, the hearing in the above-

1 entitled matter was concluded.)

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CERTIFICATE OF REPORTER

I, **Barbara S. Price**, the stenographic reporter who was duly sworn to well and truly report the foregoing proceedings, do hereby certify that they are true and correct to the best of my knowledge and ability; and that I have no interest in said proceedings, financial or otherwise, nor through relationship with any of the parties in interest or their counsel.

IN WITNESS WHEREOF, I have hereunto set my hand this 14th day of January, 2008.

  
Barbara S. Price

Notary identification number: 7032782

Expires 12/31/10